

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES

CRIMINAL ACTION

v.

LACEY GRAVES

NO. 06-95

DuBois, J.

August 8, 2017

MEMORANDUM

Following two mistrials, Lacey Graves was convicted by a jury of armed bank robbery in violation of 18 U.S.C. § 2113(d) on November 9, 2007. The Court sentenced Graves to a term of imprisonment of fifteen years, five years of supervised release, and restitution of \$6,421. After an unsuccessful appeal, Graves filed a Motion under 28 U.S.C. § 2255, asserting that his trial counsel was ineffective on the ground that she, *inter alia*, failed to move to suppress evidence obtained pursuant to a search warrant that was facially invalid because it lacked particularity—it did not identify the items to be seized.

By Memorandum and Order dated June 27, 2013, the Court denied Graves’s § 2255 Motion, concluding in relevant part that, while a pair of New Balance sneakers and purchase receipts totaling \$226.03 seized from the home of Grave’s girlfriend would have been excluded if trial counsel had moved to suppress them, the introduction of that evidence at trial did not prejudice Graves. However, due to the uncertain state of the law, the Court granted Graves a certificate of appealability on that claim.

Relying on a case decided after this Court ruled on Graves’s § 2255 Motion, *United States v. Wright*, 777 F.3d 635 (3d Cir. 2015) (“*Wright II*”), which made the mental state of the officer who prepared the application for the search warrant and conducted the search central to the suppression inquiry, the United States Court of Appeals for the Third Circuit vacated this

Court's June 27, 2013, Order on that issue. Because this Court had not been required to make findings concerning the officer's mental state under prior law, the Third Circuit remanded the case with instructions to conduct an evidentiary hearing on the culpability of the officer.

Based on the intervening change in law and its culpability assessment of the officer's conduct following an evidentiary hearing, this Court now concludes that a motion to suppress on the basis that the search warrant lacked particularity would not be granted under current law. Because a motion to suppress would not be granted, Graves cannot show prejudice. Accordingly, the Court denies Graves's § 2255 Motion.

I. BACKGROUND¹

The Court first recounts the deficiencies in the search warrant at issue and Graves's subsequent conviction and then discusses the procedural background of Graves's § 2255 Motion and the testimony presented at the evidentiary hearing held on remand.

A. The Search Warrant

On January 18, 2006, a Univest Bank branch was robbed of \$6,421 in cash. The testimony of eyewitnesses led police to suspect Lacey Graves as the robber. Special Agent Kenneth G. Vincent applied for two warrants authorizing the searches of Graves's Isuzu Rodeo SUV and the home of his girlfriend, Leslie Neal. Only the warrant authorizing the search of Neal's home is at issue at this stage of the proceedings. Nonetheless, the Court discusses both warrants because the warrant for Graves's vehicle is relevant to the Court's analysis of his claim.

¹ For further background on the case, see *United States v. Graves*, 613 F. App'x 157 (3d Cir. 2015); *United States v. Graves*, 951 F. Supp. 2d 758 (E.D. Pa. 2013); *United States v. Graves*, 373 F. App'x 229 (3d Cir. 2010); *United States v. Graves*, 2007 WL 2461744 (E.D. Pa. Aug. 22, 2007); *United States v. Graves*, 2007 WL 2319765 (E.D. Pa. July 13, 2007); *United States v. Graves*, 465 F. Supp. 2d 450 (E.D. Pa. 2006); *United States v. Graves*, 2006 WL 1997378 (E.D. Pa. July 12, 2006).

Each warrant application contained four sections describing: (1) the person or property to be searched, (2) the evidence to be seized, (3) the basis for the search under Federal Rule of Criminal Procedure 41(b), and (4) the facts supporting a finding of probable cause. Vincent supplied the necessary information for the applications' first and third sections, and completed the fourth section of each by writing "see attached affidavit." Vincent left the second section completely blank on both applications and warrants. As a result, the warrants on their face did not contain any description of the items to be seized from Neal's home or from Graves's vehicle.

Vincent included a sworn affidavit with each warrant package setting forth the facts in support of his belief that there was probable cause to search Neal's home and Graves's car. The affidavits were accompanied by Attachments A and B. Attachment A described the premises to be searched—Neal's home in one, and Graves's car in the other. Attachment B was titled "Items to be Seized." Attachment B to the affidavit for the search of Neal's home listed, among other things, "shoes consistent with footprints recovered from the crime scene." That attachment did not list receipts or other evidence of financial gain from the robbery.

Each affidavit referenced only Attachment A, and contained no mention of Attachment B, which listed the items to be seized. Magistrate Judge Hart signed the last page of both affidavits for the purpose of certifying that Vincent had sworn to it, but did not sign or acknowledge the attachments. Neither the warrants nor the affidavits incorporated or referenced the list of items to be seized contained in Attachment B.

The warrants were executed, and officers recovered evidence from Neal's home, including receipts for purchases totaling \$226.03 and a pair of men's New Balance sneakers.

B. Graves's Conviction

The Government's theory of the case at trial was that Graves, wearing a mask and sunglasses, walked into a branch office of Univest Bank, displayed a handgun, jumped over the teller counter, and stole \$6,421 in cash. The Government presented physical evidence recovered from the search and the testimony of eyewitnesses who identified Graves as the robber. An FBI expert in forensic shoe print examinations testified for the Government that a shoe impression left on the teller counter was consistent with the New Balance sneakers recovered from Neal's home, but he could not definitively state that the prints were left by that specific pair of sneakers.

Graves appealed his conviction, and the Third Circuit affirmed the judgment on November 3, 2010. *United States v. Graves*, 373 F. App'x 229 (3d Cir. 2010).

C. Procedural History of Graves's § 2255 Motion

On October 6, 2010, Graves filed the pending Motion under 28 U.S.C. § 2255. Graves asserted that his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for (1) failing to call Neal as a witness at his third trial and (2) failing to challenge the facially invalid search warrants for his car and Neal's home. The Court held an evidentiary hearing on April 5, 2012. Counsel then submitted additional briefs on the law applicable to evidence seized pursuant to search warrants that were facially invalid because the items to be seized were not specified.

By Memorandum and Order dated June 27, 2013, the Court denied Graves's Motion. *United States v. Graves*, 951 F. Supp. 2d 758 (E.D. Pa. 2013). The Court concluded, *inter alia*, that Graves's counsel was objectively unreasonable in failing to file a motion to suppress the evidence recovered from Neal's home on the ground that the evidence was seized pursuant to a facially invalid warrant, but that Graves suffered no prejudice as a result of the introduction of

the challenged evidence seized from Neal’s home at his trial—the pair of New Balance sneakers and \$226.03 in purchase receipts. *Id.* at 765-66, 774. Because the law surrounding the applicability of the exclusionary rule to facially invalid warrants was uncertain at that time, the Court granted Graves a certificate of appealability as to that issue.² *Id.* at 775-76.

On appeal, the Third Circuit vacated that part of the June 27, 2013, Order regarding the challenged evidence seized from Neal’s home and remanded for an evidentiary hearing to assess Vincent’s culpability in connection with that search in light of a new precedential opinion, *Wright II*, 777 F.3d 635 (3d Cir. 2015), issued while the appeal in *Graves* was pending. *United States v. Graves*, 613 F. App’x 157, 160, 163 (3d Cir. 2015). In *Wright II*, the Third Circuit held that, even when confronting a facially invalid search warrant, the trial court must “examine the totality of the circumstances to assess if the officer was sufficiently culpable for the costs of suppression to outweigh its benefits.” *Id.* at 162 (citing *Wright II*, 777 F.3d at 640, 642).³

D. The Evidentiary Hearing on Remand

On August 24, 2015, the Court held an evidentiary hearing to assess Vincent’s culpability during the preparation and execution of the search warrant for Neal’s home. Vincent testified that he served as an FBI agent for twenty-one years, from 1987 to 2008. Hr’g Tr. 7:19. He prepared the warrant applications in Graves’s case with the assistance of an administrative person and in consultation with the United States Attorney’s Office. *Id.* at 9:5-6; 11:6. He also

² The Court of Appeals for the Third Circuit expanded the certificate of appealability to include counsel’s failure to call Neal as a witness and affirmed this Court’s decision on that issue. *United States v. Graves*, 613 F. App’x 157, 158, 163 (3d Cir. 2015).

³ By Order dated July 6, 2016, the Court granted Graves’s Motion to Amend his § 2255 Motion to add claims under *Johnson v. United States*, 135 S. Ct. 2552 (2015). In the same Order, the Court severed those claims from the claims presented and discussed in this Memorandum. On March 22, 2017, Graves’s counsel filed a Notice of Withdrawal of 28 U.S.C. § 2255 Motion, limited to Graves’s claims under *Johnson*. The Court approved the Notice of Withdrawal by Order dated April 18, 2017. A ruling on the issues presented in this Memorandum was deferred until Graves’s claims under *Johnson* were resolved.

testified that he had been trained to include a description of what was to be seized on applications and warrants, either explicitly or by referencing another attached document, *id.* at 32:13-23, and that the sections describing the items to be seized were left blank on the applications and the faces of the warrants by mistake. *Id.* at 29:20-22. Neither he, his supervisor, the Assistant United States Attorney, nor Magistrate Judge Hart noticed that the sections were blank. *Id.* at 11:4, 11:14-19. According to Vincent, the entire warrant package for the search of Neal's home, including the list of items to be seized in Attachment B, was submitted to Magistrate Judge Hart, but he could not specifically recall what transpired at the meeting with Magistrate Judge Hart. Hr'g Tr. at 19:12-14; 22:21-25.

When Vincent executed the warrant for the search of Neal's home, he reviewed the list of items in Attachment B with Neal and gave her a copy of the warrant that included the attachments. *Id.* at 11:23-25; 13:15-22; 14:4-5. On direct examination, Vincent testified that he believed the search of Neal's home was limited to the items listed in Attachment B. *Id.* at 13:22-25. On cross-examination, however, he admitted that he had testified in Graves's second trial that he seized receipts from Neal's home and had mistakenly failed to include receipts or evidence of financial gain from the robbery in the Attachment B list. *Id.* at 41:5-16. Overall, Vincent emphasized that he "attempted to do [his] best" and that, in retrospect, he should have written "see Attachment B," in the blank spaces on the applications and warrants. *Id.* at 26:25-27:15.

II. APPLICABLE LAW

Ineffective assistance of counsel claims are analyzed in two steps. "First, the defendant must show that counsel's performance was deficient," meaning that it "fell below an objective standard of reasonableness" under all the circumstances, including "prevailing professional

norms.” *Strickland*, 466 U.S. at 687-88. “A court considering a claim of ineffective assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). “Second, the defendant must show that [counsel’s] deficient performance prejudiced the defense,” which requires the defendant to demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 687, 694.

“The effect of counsel’s inadequate performance must be evaluated in light of the totality of the evidence at trial: ‘a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.’” *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) (citing *Strickland*, 466 U.S. at 696).

III. DISCUSSION

The Court concludes that Graves cannot show prejudice because the evidence seized from Neal’s home would not have been suppressed under the exclusionary rule based on the current state of the law. Because the Court concludes that Graves cannot show prejudice, it will not address the deficient performance prong of *Strickland*.⁴

⁴ *Strickland*, 466 U.S. at 697 (“Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”).

A. Prejudice Inquiry – Guiding Law

To establish prejudice the defendant must demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. In making the prejudice determination, the Court must consider current developments in the law so as to determine whether trial counsel’s performance “deprive[s] the defendant of any substantive or procedural right to which the law entitles him.” *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Whether there is a reasonable probability that the result of Graves’s trial would have been different but for counsel’s failure to move to suppress the evidence seized from Neal’s home depends on whether that evidence would have been suppressed under the exclusionary rule in effect at the time of the habeas review. *See Lockhart*, 506 U.S. at 372. Since the time of Graves’s trial in 2007, the exclusionary rule has been limited, while the good faith exception to the exclusionary rule has been expanded. Criminal defendants must now satisfy a more challenging standard to obtain the exclusion of illegally seized evidence than at the time of Graves’s trial.⁵

B. The Exclusionary Rule after *Herring*

“In *United States v. Leon*, [468 U.S. 897 (1984),] the Supreme Court recognized that the purpose of the exclusionary rule—to deter police misconduct—would not be furthered by suppressing evidence obtained during a search when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.” *Tracey*,

⁵ This was primarily the result of the Supreme Court decision in *Herring v. United States*, 555 U.S. 135 (2009), and subsequent decisions from the Court of Appeals for the Third Circuit interpreting *Herring*. *See United States v. Tracey*, 597 F.3d 140 (3d Cir. 2010); *Virgin Islands v. John*, 654 F.3d 412 (3d Cir. 2011); *United States v. Wright*, 493 F. App’x 265 (3d Cir. 2012) (“*Wright I*”); *United States v. Franz*, 772 F.3d 134 (3d Cir. 2014); *Wright II*, 777 F.3d 635.

597 F.3d at 150. In *Herring*, the Supreme Court reaffirmed that the purpose of the exclusionary rule is to deter future Fourth Amendment violations. 555 U.S. at 143-44. “Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted.” *Davis v. United States*, 131 S. Ct. 2419, 2426-27 (2011) (internal quotation marks omitted).

The Supreme Court explained that the “good faith” exception to the exclusionary rule, first enunciated in *Leon*, was established because “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” *Herring*, 555 U.S. at 146 (quoting *Leon*, 468 U.S. at 922). After Graves was convicted, the Court in *Herring* limited the exclusionary rule to cases where the police violate the Fourth Amendment with “deliberate, reckless, or grossly negligent conduct” and where “the benefits of deterrence. . . outweigh the costs” of “letting guilty and possibly dangerous defendants go free.” *Id.* at 141, 144. When confronted with a violation that was the result of “mere negligence,” however, “exclusion cannot pay its way” because “there is nothing to deter.” *Wright I*, 493 F. App’x at 271-72 (quoting *Herring*, 555 U.S. at 147-48); *see also Davis*, 131 S. Ct. at 2424, 2428.

The Government argues that, under *Herring* and its progeny, the evidence seized from Neal’s home is not subject to the exclusionary rule, and therefore Graves could not have suffered any prejudice as a result of his trial counsel’s failure to move to suppress the evidence. This Court previously rejected that argument, relying on *Virgin Islands v. John*, 654 F.3d 412, 418 (3d Cir. 2012), which held that facially invalid warrants result from “conduct that is deliberate, reckless, or grossly negligent, and thus the benefits of deterring future misconduct outweigh the costs of excluding the evidence.” *Graves*, 951 F. Supp. 2d at 772-73. This Court determined that the evidence seized from Neal’s home would have been suppressed under *John* because

Vincent's conduct constituted gross negligence, but that Graves suffered no prejudice because there was not a reasonable probability that the result of his trial would have been different if the evidence seized from Neal's home was excluded. *Id.* at 774-75.

The Third Circuit in *John* articulated a *per se* rule that facially invalid warrants were presumed to be the result of at least gross negligence. 654 F.3d at 418. Under that ruling, a police officer's mental state was not relevant in determining issues such as those presented in this case. By contrast, a different panel of the Third Circuit, in *Wright I*, 93 F. App'x 26 (3d Cir. 2012), ruled that evidence seized pursuant to a facially invalid warrant could only be excluded if *both* (1) the good faith exception did not apply and (2) the evidence was seized due to "deliberate, reckless, or grossly negligent" conduct by law enforcement. *Wright I*, 493 F. App'x at 272-73. This Court, relying on *John* because it was a precedential opinion, whereas *Wright I* was non-precedential, denied the Government's request for an evidentiary hearing to assess Vincent's culpability under *Wright I*. *Graves*, 951 F. Supp. 2d at 772.

On appeal, the Third Circuit vacated this Court's decision based on an intervening opinion, *Wright II*, 777 F.3d 635 (3d Cir. 2015). In *Wright II*, the Third Circuit ruled that, even if a warrant is facially invalid, courts must examine the totality of the circumstances to assess whether the officer was "sufficiently culpable for the costs of suppression to outweigh its benefits." *Id.* at 639, 642. According to the Third Circuit, *Wright II* "makes clear that an individual officer's mental state is relevant and that a suppression motion should be granted only if the officer acted deliberately, recklessly, or with gross negligence." *Graves*, 613 F. App'x at 162 (citing *Wright II*, 777 F.3d at 638)). A district court must now evaluate an officer's culpability and "consider (1) the extent to which the violation undermined the purposes of the Fourth Amendment: assuring in writing that the magistrate found probable cause to search and

seize the items mentioned, preventing ‘general searches,’ and informing the subject of the search of the scope of the search; and (2) what the Government gained from the violation.” *Id.* (citing *Wright II*, 777 F.3d at 640).

In its previous opinion, the Court did not consider Vincent’s culpability based on the framework set out in *John*. In view of the intervening change in the law and the Court’s assessment of Vincent’s culpability following an evidentiary hearing, the Court now agrees with the Third Circuit’s statement that Vincent’s actions were the product of negligence. For the reasons articulated below, the Court finds that the Fourth Amendment violation in this case resulted from Vincent’s negligence, as opposed to gross negligence, and therefore the exclusionary rule does not apply to the evidence seized from Neal’s home. Accordingly, counsel’s failure to move to suppress the evidence did not deprive Graves of a substantive or procedural right to which he is entitled under the law, and thus Graves cannot prove that he suffered prejudice as a consequence of that failure.

C. Vincent’s Culpability

The Court first assesses Vincent’s culpability relative to officers in other cases within the Third Circuit and then discusses factors relevant to the value of deterrence in making its culpability determination. The Court then assesses the costs and benefits of excluding the evidence recovered from Neal’s home.

1. *Relative Culpability*

Under Third Circuit law, the court must now examine several factors to determine whether an officer’s violation of the Fourth Amendment resulted from mere negligence or more culpable conduct. These factors include: (1) whether “an officer could understandably believe that he had met the requirements of the Fourth Amendment,” *Tracey*, 597 F.3d at 152, (2) that

“[a] reasonable officer would [] have confidence in the validity of the warrant after presenting it and having it approved by a district attorney and the Magistrate Judge,” *id.* at 153, (3) whether the officer “acted in consultation with federal [or other] prosecutors,” *Franz*, 772 F.3d at 147, and (4) whether the “agent [or officer] made a mistake” or acted deliberately, *id.* at 148. “The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of [officers].” *Herring*, 555 U.S. at 145.

For example, in *Tracey*, the face of the warrant contained a description of the items to be seized that was overly broad, but the attached affidavit described the items with sufficient particularity. *Id.* at 151. The *Tracey* court determined that the officer “could have reasonably relied on the warrant because a reasonable officer in his position would assume that the warrant included and would be construed with the attached affidavit.” *Id.* at 152. “A reasonable officer [also] would have confidence in the validity of the warrant after presenting it and having it approved by a district attorney and magistrate judge, as occurred here.” *Id.* at 153. Continuing, the *Tracey* court concluded that “[t]he officer’s failure to incorporate the affidavit—a task that could be accomplished by simply adding ‘see attached affidavit’” did “not amount to deliberate, reckless, or grossly negligent conduct that justifies the application of the exclusionary rule.” *Id.* at 154; *see also Franz*, 772 F.3d at 147-49 (holding that officer was only negligent in refusing to show subject of search the list of items to be seized because the officer “had no intention of concealing” the list and mistakenly relied on a vague sealing order from the magistrate).

Similar factors were considered in *Wright II*. In that case, a valid warrant was executed without the attached list of items to be seized because the affidavit containing the list was impounded. *United States v. Wright*, 2013 WL 3090304, at *1 (E.D. Pa. June 20, 2013). On remand after *Wright I*, the district court stated that “[t]he warrant was invalid because of a simple

mistake” and that the officer had no “intention of concealing the subject matter or the information concerning the items to be seized.” *Id.* at *6, *9. Accordingly, the district court concluded that the officer was merely negligent. *Id.* at *9. The Third Circuit affirmed in *Wright II* because the officer “was not sufficiently culpable for the costs of suppression to outweigh its benefits.” 777 F.3d at 642.

While the Court agrees with Graves that *Franz* and *Wright II* are not directly on point because the errors in those cases occurred after the warrant was approved by a magistrate, Vincent testified that the entire warrant package including Attachment B, which contained a list of items to be seized, was presented to Magistrate Judge Hart for his approval. Hr’g Tr. at 19:12-14, 22:21-25. Furthermore, although “an officer’s knowledge and experience bears on whether it was objectively reasonable for that officer to believe the search was legal,” *see Wright II*, 777 F.3d at 639, even officers like Vincent, who had nineteen years of experience, can overlook a drafting error without transforming their conduct from negligence to gross negligence. At the evidentiary hearing, Vincent testified he made a mistake in this case by not specifying the items to be seized in a search on the face of a warrant, either explicitly or by reference to an attachment as he ordinarily does. Hr’g Tr. at 26:25-27:15; 29:20-22; 32:13-23; 41:5-11. Like the situation in *Tracey*, Vincent’s mistake could have been remedied “by simply adding” the words “see Attachment B” to the face of the warrant and does not “amount to deliberate, reckless, or grossly negligent conduct.” 597 F.3d at 154.

Vincent also worked with the United States Attorney’s Office to draft the warrant and supporting documents, and he ultimately obtained approval of the warrant from Magistrate Judge Hart. Hr’g Tr. at 9:1-20. Neither he, his supervisor, the Assistant United States Attorney, nor Magistrate Judge Hart noticed that the relevant sections were blank. As the Third Circuit has

stated, the exclusionary rule should be applied carefully in cases where law enforcement officers work with attorneys to ensure that they are complying with the law because “[a] reasonable officer would have confidence in the validity of the warrant after presenting it and having it approved by a district attorney and magistrate judge, as occurred here.” *Tracey*, 597 F.3d at 153. Vincent’s reliance on the approval by Magistrate Judge Hart was objectively reasonable in this circumstance. Finally, like many of the other cases decided by the Third Circuit, there is no evidence in this case that Vincent “had any intention of concealing. . . the information concerning the items to be seized.” *Wright*, 2013 WL 3090304, at *9. Based on the foregoing, the Court concludes that Vincent’s conduct was not more culpable than the conduct of the officers in *Tracey*, *Wright II*, and *Franz*.

However, a determination of “relative culpability [to those other officers] does not [] answer the question of whether [the agent’s] conduct meets the standard for gross negligence.” *Wright II*, 777 F.3d at 640. Because the difference between “grossly negligent” and “negligent in the ordinary sense is difficult to assess if [the Court] consult[s] only the hornbook formulations of these terms,” “the precautions [the Court] would expect an officer to take depend largely on what might happen if he failed to take them.” *Id.* at 640. “Accordingly, [the Court] considers [as part of the culpability analysis] (1) the extent to which the violation in this case undermined the purposes of the Fourth Amendment and (2) what the Government gained from the violation” in reaching its determination. *Id.*

2. *Purposes of the Fourth Amendment’s Particularity Requirement*

The particularity requirement of the Fourth Amendment serves three purposes: (1) providing “written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned,” (2) preventing general searches by confining the discretion

of officers and authorizing them to seize only particular items, and (3) informing the subject of the search that the executing officer is legally authorized to conduct a search according to certain limitations. *Wright II*, 777 F.3d at 640 (quoting *Groh*, 540 U.S. at 560).

The first purpose of the Fourth Amendment was undermined by Vincent's conduct because there is no evidence that Magistrate Judge Hart examined Attachment B and agreed that there was probable cause to search for and seize each item on the list. Magistrate Judge Hart signed only the actual warrant, which had no description of the items to be seized from Neal's home, hr'g tr. at 10:15-25, and Vincent's affidavit, which did not reference Attachment B, for the purpose of certifying that Vincent had sworn to it, *id.* at 35:15-19; Warrant Package, ECF No. 262; *cf. Tracey*, 597 F.3d at 152 (noting that the magistrate and officer signed each page of the affidavit, which contained the description of what would be seized, and concluding that the officer "could have reasonably relied on the warrant because a reasonable officer in his position would assume that the warrant incorporated and would be construed with the attached affidavit"). While Vincent testified that the list of items contained in Attachment B was submitted to Magistrate Judge Hart with the rest of the warrant package, he could not remember whether Magistrate Judge Hart actually looked at the list. Hr'g Tr. at 19:12-14; 22:21-25. Because there is no evidence that Magistrate Judge Hart actually saw Attachment B, there is no "written assurance" that Magistrate Judge Hart saw the list and agreed that there was probable cause to seize each of the items. *See Wright II*, 777 F.3d at 640. Thus, the Court concludes that the first purpose of the particularity requirement was undermined.

The second purpose of the particularity requirement is to prevent general searches by constraining officers' discretion with a warrant. *Id.* at 640. General warrants "vest the executing officers with unbridled discretion to conduct an exploratory rummaging through [a defendant's]

papers in search of criminal evidence.” *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents* (\$92,422.57), 307 F.3d 137, 149 (3d Cir. 2002). The Third Circuit has noted a contrast between a “general warrant” and “a warrant that is simply overly broad,” the latter of which “describes in both specific and inclusive generic terms what is to be seized, but it authorizes the seizure of items as to which there is no probable cause. . . . Evidence seized pursuant to an overly broad warrant need not be suppressed if the good faith exception applies.” *Id.*

In this case, Attachment B authorized the seizure of:

Bank robbery loot – U.S. currency; Bank money straps from UNIVEST Bank; shoes consistent with footprints recovered from crime scene; Footprints consistent with footprints recovered from crime scene; Black or dark navy blue cargo type pants; Black or dark navy blue hoody; Black or dark navy blue waist length jacket with a large horizontal white stripe; A bandana; Ownership documents for a 1994 Isuzu Rodeo SUV with registration number. . . and/or the vehicle identification number. . . ; a handgun; handgun ammunition.

Warrant Package, ECF No. 262. Some of these descriptions are broad, but the list certainly does “not authorize an exploratory rummaging.” *Tracey*, 597 F.3d at 154. The officers’ discretion was limited to search for a short list of specific items.

Courts have also assessed whether the scope of the actual search was confined to what was set forth in the warrant. *See Tracey*, 597 F.3d at 153 (“We also note that the applicability of the good faith exception is appropriate because Holler, who drafted the narrower affidavit and was aware of its limits, led the search team at Tracey’s home,” which limited its search to the items in the affidavit). In this case, Vincent acknowledged that the receipts seized from Neal’s home were not authorized by any enumerated item on the list contained in Attachment B. Hr’g Tr. at 41:5-16. However, he testified that this was another drafting mistake in the warrant and that evidence of financial gain from the crime is usually included as a matter of course. *Id.*

Based on Vincent's testimony, the Court finds that the search in this case, while not strictly limited to the scope outlined in the warrant, was sufficiently constrained so as to not violate the particularity requirement's purpose of preventing general searches. Accordingly, the second purpose of the particularity requirement was not undermined in this case.

Finally, the third purpose of the particularity requirement is to provide specific information to the subject of the search regarding what will be searched and seized. *Wright II*, 777 F.3d at 640. In *Wright II*, the Third Circuit concluded that this purpose was undermined when the officer did not present the list of items to be seized to the occupants of the searched property. *Id.* (citing *Franz*, 772 F.3d at 148-49 (applying good faith exception when officer did not present list of items to be seized to subject of search because he reasonably believed he was not permitted to do so by the Magistrate's sealing order)). In this case, Vincent testified that he reviewed the list of items in Attachment B with Neal at the outset of the search and left a copy of Attachment B with Neal. Graves has not presented any evidence to the contrary. Thus, the third purpose of the particularity requirement was not undermined by the violation in this case.

3. *Government Gain from the Violation*

Finally, under *Wright II*, a court must also evaluate what the government gained—if anything—from the Fourth Amendment violation in making its culpability determination. The court must determine whether the Government's case would have been different had the violation not occurred. *See Wright II*, 777 F.3d at 641 ("Even if the list of items to be seized had been present at the scene, the agents would have collected precisely the same evidence, and Wright would have been unable to stop them.").

In this case, if the warrant for the search of Neal's home had incorporated Attachment B, the same evidence—the sneakers and the receipts—would have been seized and admitted at

Graves's trial. Thus, "[t]he violation in this case had no impact on the evidence that could be deployed against [Graves] at trial." *Id.*

Based on Vincent's testimony at the evidentiary hearing and the Court's analysis of his conduct, the Court concludes that Vincent's violation of the Fourth Amendment was the result of mere negligence and not more culpable behavior.

D. Costs and Benefits of Exclusion

The Court must now consider whether the costs of suppression are warranted in this case. "[E]xclusion is appropriate only where law enforcement conduct is both 'sufficiently deliberate' that deterrence is effective and 'sufficiently culpable' that deterrence outweighs the costs of suppression." *United States v. Katzin*, 769 F.3d 163, 171 (3d Cir. 2014) (quoting *Herring*, 555 U.S. at 144). "[T]he deterrent value of suppression must overcome the resulting social costs" of excluding often probative evidence. *Id.* "These costs often include omitting reliable, trustworthy evidence of a defendant's guilt, thereby suppressing the truth and setting a criminal loose in the community without punishment. As this result conflicts with the truth-finding functions of judge and jury, exclusion is a bitter pill swallowed only as a last resort." *Id.* (quoting *Davis*, 131 S. Ct. at 2427; *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)) (internal quotation marks omitted). As the Third Circuit explained in *Wright II*:

[The defendant] is undoubtedly correct to point out that suppression would incentivize the Government to carefully scrutinize each warrant before it is executed. . . . In the context of suppression, however, the Supreme Court has unequivocally held that deterring isolated negligence is not worth the social cost of excluded evidence.

Wright II, 777 F.3d at 641-42 (citing *Herring*, 555 U.S. at 144 n.4). "Only if mistakes of this nature recur with some frequency will a criminal defendant be in a position to argue that the calculus has changed." *Id.* at 642.

Graves argues that the fact that both warrants in Graves’s case—for Graves’s SUV and for Neal’s home—suffered from the same defect shows that this is a recurring error. The Court disagrees. Two mistakes by the same agent in a single case, over the course of two days, do not provide evidence of “recurring or systemic negligence” by a law enforcement agency or group of its officers. *See Davis*, 564 U.S. at 2428 (“Nor does this case involve any recurring or systemic negligence on the part of law enforcement.”). Rather, while both warrants in this case were facially invalid, they were rendered invalid as the result of a single mistake.

The Court concludes that the costs of exclusion in this case outweigh the benefits because Vincent’s mistake of not explicitly incorporating Attachment B into the warrant was the result of mere negligence. *See Franz*, 772 F.3d at 149 (concluding that officer acted negligently and then stating that “[i]n short, application of the exclusionary rule would provide little deterrent effect and would not justify the costs of suppression”). The Fourth Amendment violation in this case was the result of a “misstep.” *Franz*, 772 F.3d at 149. Vincent acted in good faith and was objectively reasonable in relying on the prosecutor’s and magistrate’s determinations that the warrant for the search of Neal’s home was valid. The deterrence of isolated acts of mere negligence, such as the one in this case, does not outweigh the cost of suppression. The Court thus concludes that the evidence at issue should not be suppressed because the Fourth Amendment violation was not “sufficiently deliberate.” *See Herring*, 555 U.S. at 144.

IV. CONCLUSION

The Court determines that Graves has not shown prejudice because, under current law, the evidence seized during the search of Neal’s home would not be excluded under the exclusionary rule. Because the evidence seized from Neal’s home would not be excluded, Graves cannot show that trial counsel’s failure “deprive[d] [him] of any substantive or

procedural right to which the law entitles him.” *Terry Williams v. Taylor*, 529 U.S. 362, 392 (2000). Accordingly, Graves’s ineffective assistance of counsel claim must be rejected.

For the foregoing reasons, Graves’s Motion under 28 U.S.C. § 2255 is denied. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES

CRIMINAL ACTION

v.

LACEY GRAVES

NO. 06-95

ORDER

AND NOW, this 8th day of August, 2017, upon consideration of Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Document No. 215, filed October 6, 2010), the related filings of the parties, and following a hearing on August 24, 2015, for the reasons set forth in the accompanying Memorandum dated August 8, 2017, **IT IS ORDERED** that Defendant's Motion under 28 U.S.C. § 2255 is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not issue because reasonable jurists would not debate this Court's decision that the Motion does not state a valid claim of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.